

The Administrative Law Judge awarded benefits for a 17 percent permanent partial general body disability and assessed 100 percent of the benefits, incurred after September

16, 1992, to be paid by the Kansas Workers Compensation Fund. Claimant appeals from the findings relating to nature and extent of his disability. The Kansas Workers Compensation Fund appeals from the award of benefits to be paid by the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant's injury resulted in and claimant is entitled to benefits based upon a 17 percent permanent partial general body disability. The findings and conclusions by the Administrative Law Judge on this issue should be affirmed.

Claimant worked the night shift at respondent's school for boys. He was injured on at least five separate occasions during the period April 1992 through October 10, 1992. Each injury involved an altercation with one or more of the boys or an attempt to break up an altercation between or among some of the boys. The injuries were to the lumbar and thoracic areas of claimant's back. Dr. Ozanne, a treating physician, diagnosed degenerative disc disease at L2-3, either thoracic disc herniation or degenerative disc disease at T6-8 and on July 8, 1993, Dr. Ozanne performed a decompressive laminectomy and fusion at L2-3. Dr. Ozanne also believes that claimant may yet require thoracic surgery, including a fusion from T5-8.

Dr. Ozanne recommended restrictions in claimant's work activities. Specifically, he recommended that claimant lift not more than 20 pounds occasionally and 10 pounds frequently. He indicates that in certain types of lifting he might be able to lift up to 35 pounds, occasionally. He also recommended claimant avoid bending, reaching, climbing, squatting, kneeling and crawling except on an occasional basis. He suggested that standing and walking could be performed frequently and sitting constantly. He recommended claimant be allowed the opportunity to change positions throughout the workday from sitting to standing to walking activities. He rated claimant's impairment at 17 percent of the body as a whole.

The injuries at issue in this case were considered by Dr. Ozanne to be an aggravation of a preexisting injury and impairment. Claimant injured his back in 1974 while in the armed service. He had initially been rated as having a 10 percent general body impairment and received benefits on that basis. Following his service in the Army, claimant worked as a park ranger from 1979 through 1982 and as a roughneck from 1982 through 1987. In 1987 claimant sought additional treatment for his back through the Veterans Administration and the impairment rating was raised to 20 percent impairment to the body at that time.

Claimant was evaluated by Jerry D. Hardin on May 23, 1994. Mr. Hardin gave opinions relating to the effect of claimant's injuries on his ability to obtain employment in the open labor market and to earn comparable wages. Mr. Hardin concluded that claimant had suffered a 35-40 percent reduction in his ability to perform work in the open labor market and a 15 percent reduction in his ability to earn comparable wages.

Respondent argues, and the Administrative Law Judge agreed, that the opinion of Mr. Hardin should not be considered because it fails to take into account claimant's

preexisting injuries. Claimant, on the other hand, argues that the record does not show specific work restrictions prior to the injuries at issue in this case.

Based upon a review of the entire record the Appeals Board concludes the testimony of Mr. Hardin cannot be relied upon, in this case, for credible opinions regarding the effect of claimant's injuries to obtain employment in the open labor market. From the record the Appeals Board concludes claimant's ability to perform work in the open labor market and to earn comparable wages was, in fact, reduced by prior injury and disability. Although claimant gives somewhat inconsistent testimony regarding the effects of the prior injury, it seems clear that at least since 1987 he avoided certain kinds of work because of the injury. Claimant testified that at the time his disability benefits were determined by the VA they may have told him he had limitations, but he did not recall the specifics. He did recall they told him that if he reached the point he was not able to walk they would recommend surgery. He acknowledged he had ongoing problems with pain in his low back. He took medication for the pain essentially daily and sought medical treatment on an ongoing basis up to the time of injuries in this case. The record, as indicated, convinces the Appeals Board that there were restrictions on claimant's ability to perform work in the open labor market. The record does not establish, with adequate specificity, what those restrictions would be. As a result the opinions of Mr. Hardin, which assume no prior restrictions, cannot be relied upon.

The only functional impairment rating in the record is that of Dr. Ozanne. He rates claimant's impairment at 17 percent to the body as a whole. The Appeals Board, therefore, finds claimant's functional impairment to be 17 percent to the body as a whole. In the absence of convincing evidence relating to the nature and extent of any work disability, the award will be based upon that functional impairment rating.

(2) The Appeals Board finds that the Kansas Workers Compensation Fund should be liable for 100 percent of the benefits awarded.

The Administrative Law Judge awarded benefits incurred after claimant's injury in September of 1992. He did so because it was clear in the record that respondent had knowledge of claimant's injury as of that date.

The Appeals Board concludes, however, that the claimant knowingly misrepresented his injuries at the time of his employment for respondent. Claimant was asked whether he had any disability. He responded in the affirmative and then explained that he wore hearing aids. He did not disclose his previous back injury. The Fund argues that claimant's responses do not constitute knowing misrepresentation because claimant has testified he did not believe himself to be disabled due to his back injury at the time of his employment. The Appeals Board does not, however, find this testimony convincing in light of the fact that he was receiving benefits for a disability through the Veterans Administration, was taking medication, experiencing ongoing pain and undergoing ongoing treatment for his low back injuries at the time he applied for employment with the respondent.

The Appeals Board finds and concludes claimant did knowingly misrepresent that he did not have such an impairment or handicap. Dr. Ozanne has testified that the injuries at issue in this case would not have occurred but for the preexisting impairment. The Appeals Board, therefore, agrees with and affirms the finding that the Kansas Workers Compensation Fund should be responsible for 100 percent of the benefits paid. The

Appeals Board modifies the Award to include any benefits or other expenses incurred prior to September of 1992 as well as those after.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated November 8, 1995 should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dennis L. Jesseph, and against the respondent, St. Francis Academy, and its insurance carrier, Hartford Accident & Indemnity, and the Kansas Workers Compensation Fund, for an accidental injury which occurred April through October 10, 1992 and based upon an average weekly wage of \$330.17, for 68 weeks of temporary total disability compensation at the rate of \$220.12 per week or \$14,968.16, followed by 347 weeks at the rate of \$37.42 per week or \$12,984.74 for a 17% permanent partial general body impairment of function, making a total award of \$27,952.90.

As of March 29, 1996, there is due and owing claimant 68 weeks of temporary total disability compensation at the rate of \$220.12 per week or \$14,968.16, followed by 112.86 weeks of permanent partial disability compensation at the rate of \$37.42 per week in the sum of \$4,223.22, for a total of \$19,191.38 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,761.52 is to be paid for 234.14 weeks at the rate of \$37.42 per week, until fully paid or further order of the Director.

The Appeals Board adopts and approves all other orders entered in the Award.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
John W. Mize, Salina, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director